79-191

Supreme Court, U. S.
FILED
AUG 6 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. .....

MICHAEL PATRICK CLANCEY,

Petitioner,

vs.

THE UNITED STATES HOUSE OF REPRESENTATIVES; CARL ALBERT, individually and in his official capacity as Speaker of the United States House of Representatives; JOHN J. FLYNT, JR., individually and in his official capacity as the Chairman of the Committee on Standards of Official Conduct for the United States House of Representatives; and ANDREW J. HINSHAW, individually and in his official capacity as Congressman in the United States House of Representatives,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL PATRICK CLANCEY
25283 Cabot Road, Suite 201
Laguna Hills, California 92653

(714) 770-1101

Petitioner

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648 - (714) 536-7161

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IN THE

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October Term, 1979

No. .....

MICHAEL PATRICK CLANCEY,

Petitioner,

vs.

CARL ALBERT, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the United States Supreme Court, October Term 1979:

The petitioner, MICHAEL PATRICK CLANCEY, prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit filed July 5, 1979, affirming the judgment of the United States District Court for the Central District of

California which dismissed the action on the basis of mootness. This case involves issues relating to the constitutionality of Rule 43, paragraph 10, of the U. S. House of Representatives Code of Official Conduct.

OPINION BELOW

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit was filed July 5, 1979. A copy of that memornadum opinion appears in the appendix hereto as Appendix "A" (Appendix pp. 1 - 3). No formal opinion was rendered by the United States District Court for the Central District of California although a judgment of dismissal was granted in this matter by said court.

JURISDICTION

A ruling of the United States Court of Appeals for the Ninth Circuit was entered on July 5, 1979. A copy of the opinion is appended hereto (Appendix "A"). The jurisdiction of the Supreme Court is invoked pursuant to Title 28, United States Code, Section 1254(1) and Rule 22(3), Federal Rules of Appeal.

QUESTIONS PRESENTED

1. Where an individual has been elected to the United States House of Representatives and has subsequently been denied voting rights by that body for misconduct, does the election of a successor render moot an action for declaratory relief regarding the

constitutionality of the rule that was applied to deny such rights?

2. Does the case herein involve a probable recurring issue?

3. Whether the practical effect of Rule 43, paragraph 10, of the House Code of Official Conduct may be construed as taxation without representation, in violation of constitutional rights and privileges bestowed upon citizens of the United States of America?

4. Did the appellate court err in affirming the judgment of dismissal of the District Court on the grounds of mootness?

HOUSE OF REPRESENTATIVES RULE INVOLVED

House Rule 43, paragraph 10, states:

> "A Member of the House of Representatives who has been convicted by a court of record for the commission of a crime for which a sentence of two or more years' imprisonment may be imposed should refrain from participation in the business of each committee of which he is a member and should refrain from voting on any question at a meeting of the House, or of the Committee of the Whole House, unless or until judicial or executive proceedings result in reinstatement of the presumption of innocence or until he is re-elected to the House after the date of such conviction."

CONSTITUTIONAL PROVISIONS INVOLVED

Set forth as Appendix "B" hereto (Appendix pp. 4 and 5) are the following constitutional provisions:

Article I, Section 5;

Article I, Section 6, Subsection 1.

STATEMENT OF THE CASE

On or about January 26, 1976, Congressman ANDREW J. HINSHAW (40th Congressional District) was convicted of two counts of felony bribery. Because of his conviction, and in accordance with Rule 43, paragraph 10, of the House Code of Official Conduct, Congressman HINSHAW was no longer allowed to vote or participate in Congressional matters, although he was still allowed to retain his seat in the House of Representatives and continued to draw his full salary and benefits.

Petitioner herein contends that said Rule 43, paragraph 10, of the House Code of Official Conduct is unconstitutional and is in contravention of Article I, Section 5 (Appendix p. 4) of the United States Constitution and other provisions of said Constitution, and asserts that it imposes a taxation upon himself and other citizens of the said 40th District without representation, since, as taxpayers, they are paying for services which they are not receiving.

The petitioner further contends that the aforesaid House resolution is totally defective and inappropriate and that it should be replaced by a House proposal to amend the Constitution of the United States to provide additional qualifications for members of Congress in addition

to those prescribed in Aritcle I, Section 5, and therein to establish a Code of Ethics which shall create a method and guidelines through which a Member of Congress can be expelled and replaced for certain wrongdoings.

On or about May 25, 1976, petitioner filed a compliant in the United States District Court, Central District of California, for declaratory relief against CARL ALBERT, Speaker of the United States House of Representatives, JOHN J. FLYNT, JR., Chairman of the Committee of Standards of Official Conduct for the United States House of Representatives, and the UNITED STATES HOUSE OF REPRESENTATIVES, alleging the above. On July 15, 1976, the complaint was amended to include the previously mentioned Congressman ANDREW J. HINSHAW and EDMUND J. HINSHAW, JR., Clerk of the United States House of Representatives, as defendants.

The Honorable Judge William P. Gray entertained three motions to dismiss. In a judgment filed on July 23, 1976, he denied a motion (made on the ground that the action was barred by sovereign immunity) to dismiss the cause against the HOUSE OF REPRESENTATIVES and granted a motion to dismiss defendants CARL ALBERT and JOHN J. FLYNT, JR. on the ground that the action against them was barred by the Speech and Debate Clause (Article I, Section 6, Subsection 1 [Appendix pp. 4 and 5]) of the United States Constitution. On September 30, 1976, the court granted a motion to dismiss the HOUSE OF REPRESENTATIVES on the ground that the action was barred by sovereign immunity.

Prior to the hearing of the Third Motion to Dismiss, Congressman ANDREW J. HINSHAW was defeated in his

bid for re-election to the House of Representatives. The Honorable Judge Gray, in a judgment of dismissal filed April 4, 1977, after a hearing, ruled the action moot. On or about July 5, 1979, the United States Court of Appeals for the Ninth Circuit filed an opinion affirming the judgment of the District Court (Appendix pp. 1 - 3).

REASONS FOR GRANTING THE WRIT

The fact that Congressman HINSHAW has been replaced in Congress is not determinative of whether or not said petitioner is entitled to an eventual hearing on the merits of petitioner's complaint, in that the case involves a potential and probable recurring issue and therefore is not moot.

If this issue can be mooted by the election of a successor to the Congressman sanctioned by use of House Rule 43, paragraph 10, the petitioner, himself, and other citizens could well be similarly affected by the application of the rule to a similar situation sometime in the future, and since the undesirable effect of House Rule 43, paragraph 10, is of short duration compared to the time required to litigate the issue, the use of the rule could again successfully evade judicial challenge.

If the allegedly invalid law or practice continues so that the issue is likely to recur, either with respect to a party or a class he represents, the mere passage of time required to obtain judicial review does not render the controversy moot.

In the case of *Southern Pacific Terminal Company v. The Interstate Commerce Commission*, 219 U.S. 498,

515, 55 L. Ed. 310, 31 S. Ct. 279 (1910), the United States Supreme Court set down a standard for escaping mootness, saying an issue is not moot if it is "capable of repetition, yet evading review." The issue in that case regarded an order of the Interstate Commerce Commission which, by its terms, had already expired. The Court said, at page 515, that the questions "involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and these considerations ought not to be, as they might be, defeated by short-term orders, capable of repetion, yet evading review, and at one time the government, and at another time the carriers, have their rights determined by the Commission without a chance of redress."

Moore et al. v. Ogilvie, Governor of Illinois, et al., 394 U.S. 814, 816, 23 L. Ed. 2d 1, 89 S. Ct. 1493 (1969), involved independent candidates for presidential electors t ting the validity of an Illinois statute governing the signing of petitions. The United States Supreme Court stated that although the election had already been held, and there was no possibility of granting relief to the appellants, the burden remains and controls future elections. "The problem is therefore 'capable of repetition, yet evading review,' . . . the need for its resolution thus reflects a continuing controversy in the federal-state area where our 'one man, one vote' decisions have thrust . . . ."

The case herein is similar, in that as long as the United States House of Representatives maintains the present rule with regard to Congressional misconduct, the burden that rule would place on the citizens of the corresponding district would be capable of repetition. The rule covers

future situations of similar nature to the case herein, and thus a continuing controversy exists.

In *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976), the news media was restrained from publishing confessions made by the defendant in a certain murder trial. The United States Supreme Court said that although the order had expired, the action was nevertheless *not moot.* Furthermore, the Court stated:

> "The Court has recognized, however, that jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one 'capable of repetition, yet evading review' . . . if we decline to address the issues in this case on grounds of mootness, the dispute will evade review, or at least be considered plenary review in this Court, since these orders are by nature short-lived . . . we therefore conclude that this case is not moot . . . . "

The case at hand is analogous. It is conceivable that the present situation would repeat itself, thus again denying petitioner and other citizens of the district their representation, *while still being taxed* to support the seat of the Congressman. Such a Congressman could again be replaced before litigation could be completed to test the rule.

In *Roe v. Wade,* 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973), a pregnant woman filed a class action challenging the validity of abortion laws. The United States Supreme Court said that the fact that by the time of judicial review her problem (pregnancy) was terminated did not render the case moot, because the issue remained as to the class she

represented. At page 125, the Court said that since the period of pregnancy is so short, it

> " . . . will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our laws should not be that rigid . . . . Pregnancy provides a classic justification for a conclusion of non-mootness. It truly could be 'capable of repetition, yet evading review'."

The case at hand is similar in that the term of office in the House of Representatives is for a short period of time. There is a high probability that at some time in the future other members of Congress will be guilty of misconduct so as to bring House Rule 43, paragraph 10, into effect, denying citizens in that district voting representation for at least the remainder of one term of office. This situation could truly be "capable of repetition, yet evading review."

See also *Dunn v. Blumstein,* 405 U.S. 330, 333 n. 2, 31 L. Ed. 2d 274, 92 S. Ct. 995 (1972), involving a class action challenging the voter residence requirement. In this case the United States Supreme Court noted:

> "Although appellee now can vote, the problem to voters posed by the Tennessee residence requirement is 'capable of repetition, yet evading review' . . . the laws in question remain on the books, and Blumstein has standing to challenge them as a member of the class of people

affected by the presently written statute."

In addition, see *Storer v. Brown,* 415 U.S. 724, 727 n. 8, 39 L. Ed. 2d 714, 94 S. Ct. 1274 (1974), where the Court noted:

> "The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is 'capable of repetition, yet evading review'."

Similarly, state officials' voluntary abandonment of long-standing improper practices does not always make an issue "moot" . . . at least where it appears that if the court dismisses, the state officials will be "free to return to their old ways" and reinstitute the challenged system. Such was the situation in *Gray v. Sanders,* 372 U.S. 368, 9 L. Ed. 2d 821, 83 S. Ct. 801 (1973), relating to an improper vote-counting system in a state primary election.

In *United States v. W. T. Grant Company,* 345 U.S. 629, 632-3, 97 L. Ed. 1303, 73 S. Ct. 894 (1952), a suit involving the Clayton Action provisions, the Court said:

> "Both sides agree to the abstract position that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot . . . . A controversy may remain to be settled in such circumstances . . . e.g., a dispute over the legality of the challenged practices . . . . The defendant is 'free to return to his old ways.' This together with a public interest in having the legality of the practices settled, militates against a mootness conclusion . . . . The case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated'."

In the case herein, there is a reasonable expectation that as long as Rule 43, paragraph 10, is in effect, the "wrong" of taxation without representation could well be repeated once again.

In the case of *Carroll et al. v. President and Commissioners of Princess Anne, et al.,* 393 U.S. 175, 178-9, 21 L. Ed. 2d 325, 89 S. Ct. 347 (1968), a temporary injunction had been issued against a "white supremacist" organization rallying. On certiorari the United States Supreme Court said:

> " . . . the case is not moot . . . it appears that the decision of the Maryland Court of Appeals continues to play a substantial role in the response of officials to their activities. In these circumstances, our jurisdiction is not at an end . . . the underlying question persists and is agitated by the continuing activities and programs of petitioners . . . the question is not moot."

In the case herein, the question persists as to what processes the Members of the United States House of Representatives may use to sanction the activities of Members of their own body.

See also *United States v. Trans. Missouri Association,*

166 U.S. 290 (1897); *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1938); *Federal Trade Commission v. Goodyear Tire and Rubber Company*, 304 U.S. 257 (1938); *Walling v. Helmerich and Payne, Inc.*, 323 U.S. 37 (1944); *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 331 U.S. 416 (1947).

In the case of *Weinstein v. Bradford*, 423 U.S. 147 (1975), the Court outlined a two-part standard for non-class actions to survive an attack on the ground of mootness. First, the action attacked must be of duration short enough that litigation will not be finished by the time the action attacked is complete (as is the case here, as is evident in the record, due to the short duration of the Congressional term). Second, there must be a reasonable expectation that the plaintiff *may* again be subject to that action (as will exist in the present situation, as long as petitioner resides in any of these United States and his representative is still subject to House Rule 43, paragraph 10.

The case at bar is distinguishable from the holdings of *Weinstein (supra)* and *Board of School Commissioners of the City of Indianapolis, et al. v. Jacobs*, 420 U.S. 128 (1974), in that in these actions the plaintiffs were no longer potentially affected by the rules disputed. In the present situation petitioner will inevitably always be subject to the effects of House Rule 43, paragraph 10.

The case at hand is also distinguishable from *S.E.C. v. Medical Committee for Human Rights*, 404 U.S. 403 (1971), in that the House is likely to repeat its allegedly wrongful application of Rule 43, paragraph 10, whereas

in *S.E.C. v. Medical Committee for Human Rights* it was doubtful the act would be repeated. In that case, which was found moot, the Court said at page 406, "If Dow were likely to repeat its allegedly illegal conduct, the case would not be moot."

In the case at bar it seems quite apparent that even though the petitioner has regained his representation in the House of Representatives, he, and other citizens of this country, could lose representation at some future time if House Rule 43, paragraph 10, is again implemented by or yielded to by Members of the United States House of Representatives.

The Constitution provides that "[e]ach House shall be the judge of the elections, returns and qualifications of its own members" (Article I, Section 5 [Appendix p. 4]). Even so, a claim that such power has been exercised *arbitrarily* is subject to judicial review. (*Adam Clayton Powell v. Speaker of the House McCormack*, 395 U.S. 486 [1969]).

CONCLUSION

This petition presents fundamental issues regarding the validity and constitutionality of House Rule 43, paragraph 10. These questions relate to the fundamental wrong of depriving citizens of an offending Congressman's district of their voting representation, while such Congressman is still allowed to retain his seat, salary and benefits at their tax expense.

The issues related to taxation without representation are obviously substantial to the petitioner, and to any other

citizen of the United States of America. It is submitted, moreover, that the issues are extremely important to the administration of justice and to the conduct of the judicial system.

As long as House Rule 43, paragraph 10, is in effect, the present situation is "capable of repetition, yet evading review." Therefore, the question is not moot.

For each of these reasons, it is respectfully requested that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

MICHAEL PATRICK CLANCEY

Petitioner

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APPENDIX "A"

OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

MICHAEL PATRICK CLANCEY, Plaintiff/Appellant, vs. CARL ALBERT, JOHN J. FLYNT, JR., and THE UNITED STATES HOUSE OF REPRESENTATIVES, et al., Defendants/Appellees.

No. 77-3010.

[Filed July 5, 1979]

Appeal from the United States District Court for the Central District of California

Before: WALLACE and TANG, Circuit Judges, and TURRENTINE*, District Judge.

TURRENTINE, District Judge:

Representative Andrew J. Hinshaw was elected in November, 1974, to a second term in Congress on behalf of the 40th District of the State of California. In January, 1976, he was found guilty of two counts of bribery by a California jury. House of Representatives Rule 43, paragraph 10, provides that a Representative convicted of a crime while in office shall refrain from voting in the House until vindicated on appeal, or re-elected by the constituency[1]. Congressman Hinshaw therefore refrained from

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*Honorable Howard B. Turrentine, United States District Judge, Southern District of California, sitting by designation.

[1]House Rule 43, paragraph 10, states:
A Member of the House of Representatives who has been convicted by a court of record for the commission of a crime for which a sentence

all participation in committee business and House voting.

On March 25, 1976, Michael P. Clancey, appellant herein, sought a declaratory judgment in the District Court that the House Rule was unconstitutional. He alleged, *inter alia,* that various defendants had denied him the constitutional right to representation through compliance with the Rule. However, Congressman Hinshaw was defeated in the primary election in June, 1976, and in January of 1977, another Representative from the 40th District was seated. Although the District Court had already dismissed as to some named defendants for a variety of reasons,[2] the entire action was dismissed on March 7, 1977, for mootness. Clancey appeals this latter dismissal.

Appellant's contention is that his claim is not moot because the controversy presented is capable of repetition, yet evades review. *Southern Pacific Terminal Co. v. I.C.C.,* 219 U.S. 498, 515 (1911). Clancey argues that because other representatives may be convicted of crime while serving, he can be deprived of his right to representation again. And he asserts that such deprivation evades review because the two-year term of service by members of Congress is too brief a period in which to seek a judicial remedy.

The Supreme Court has recently said

(1 cont'd)

> of two or more years' imprisonment may be imposed should refrain from participation in the business of each committee of which he is a member and should refrain from voting on any question at a meeting of the House, or of the Committee of the Whole House, unless or until judicial or executive proceedings result in reinstatement of the presumption of innocence or until he is reelected to the House after the date of such conviction.

[2]The District Court dismissed the action as to Congressmen Albert and Flynt on July 19, 1976, concluding that the Speech and Debate Clause of the Constitution barred the claim. And on September 20, 1976, the Court dismissed as to the House of Representatives under the doctrine of sovereign immunity.

> that *in the absence of a class action,* the "capable of repetition, yet evading review" doctrine [is] limited to the situation where two elements [are] combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, *and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.*
>
> *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975) (emphasis added), citing *Sosna v. Iowa,* 419 U.S. 393 (1975).

The chance that appellant Clancey will again reside in a district whose elected representative is convicted of a crime while serving seems too remote to amount to a "reasonable expectation" that the House Rule will again affect Clancey's representation in Congress. Therefore, we conclude that the constitutional validity of the Rule does not appear to present a recurring problem within the meaning of the phrase "capable of repetition."

Having reached this conclusion, it becomes unnecessary to consider whether Clancey has demonstrated that the issue he seeks to litigate actually does evade review. The appellant is presently represented in Congress by a member who may exercise voting rights and who may participate in committee business. For this reason, and in light of the above discussion, Clancey's claim is moot, and the judgment of the District Court dismissing the action is hereby affirmed.

APPENDIX "B"

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 5

1. Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds expel a member.

3. Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one-fifth of those present, be entered on the journal.

4. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

Article I, Section 6, Subsection 1

1. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at

the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

STATE OF CALIFORNIA)
) SS.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on AUGUST 3rd, 1979, I served the within PETITION FOR WRIT OF CERTIORARI (CLANCEY v. ALBERT) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said p arties at the addresses as follows:

Solicitor General of the United States
U. S. Department of Justice
Washington, D. C. 20530 (3 copies)

William D. Keller
United States Attorney
Central District of California
Frederick M. Brosio, Jr., Asst. U. S. Attorney
Chief, Civil Division

Stephen D. Petersen
Assistant U. S. Attorney

1100 U. S. Courthouse
312 North Spring Street
Los Angeles, California 90012 (2 copies)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on AUGUST 3rd, 1979, at HUNTINGTON BEACH, CALIFORNIA.

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Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648
(714) 536-7161